FOR ARGUMENT

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1977

No. 77-1645

TRANSAMERICA MORTGAGE ADVISORS, INC. (TAMA); KENT L. COLWELL; J. WENDELL COOMBS; JOHN R. JENSEN; RALPH D. WENGER; JOHN HAVENS; TRANSAMERICA CORPORATION; TRANSAMERICA LAND CAPITAL, INC.; AND MORTGAGE TRUST OF AMERICA,
Petitioners,

v.

HARRY LEWIS
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SUPPLEMENTAL BRIEF FOR PETITIONERS

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INTRODUCTION

This brief supplements petitioners' two earlier briefs and is filed pursuant to Rule 41(5) of the Rules of the Supreme Court of the United States.

This brief discusses recent authorities and whether this Court should distinguish between legal and equitable rights of action, a question presented during initial argument.[1]

ARGUMENT

1. Two Recent Decisions of This Court Belie Implication of a Private Right of Action Under the Investment Advisers Act.

In the six months since first hearing oral argument in this case, this Court has rendered decisions in two cases that are especially relevant here.

In *Touche Ross & Co. v. Redington*, ... U.S. ....., 99 S.Ct. 2479 (1979), this Court held that Section 17(a) of the Securities Exchange Act of 1934 does not afford a private right of action. In *Cannon v. University of Chicago*, ... U.S. ....., 99 S.Ct. 1946 (1979), this Court held that a private litigant may sue to enforce the anti-discrimination provisions of the Education Amendments of 1972.[2]

We do not think it necessary to argue at length the significance of *Touche Ross* or *Cannon*. But as we hope to explain briefly, both *Touche Ross* and *Cannon* refute respondent's contention that Section 206 of the Investment Advisers Act authorizes a private right of action.

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[1] *See*, Tr. of oral argument, *Transamerica Mortgage Advisors, Inc. (TAMA), et al. v. Harry Lewis*, Dkt. No. 77-1645, March 20, 1979, at pages 7-8, 10, 16.

[2] *See also, Burks v. Lasker*, ... U.S. ..., 99 S.Ct. 1831 (1979), where this Court ruled that the independent directors of an investment company may have the right under state law to terminate a derivative action. The decision undermines respondent's insistence that state law has "proved inadequate to protect the rights of investors in transactions and relationships within the ambit of the federal securities laws." Brief for Respondent at page 55.

Touche Ross & Co. v. Redington

In holding that Section 17(a) of the Securities Exchange Act of 1934 does not afford a private right of action, this Court stated that "the existence of a statutory cause of action is, of course, one of statutory construction." *Touche Ross & Co. v. Redington,* ..... U.S. ....., 99 S.Ct. 2479, 2485 (1979) (citations omitted). The Court rejected the argument made by respondent here[3] that a private right of action may be implied from general tort principles. *Id.*

In rejecting reliance on the jurisdiction provision of the 1934 Act to imply a private right of action, the Court said it "creates no cause of action of its own force and effect; it imposes no liabilities." *Id.* at 2490. Similarly, the jurisdiction provision of the Advisers Act neither creates nor prohibits a private right of action. But it remains an important indication of legislative intent. The *only* actions provided for in the Advisers Act are suits in equity "to enjoin any violations" of the Act.[4] Restricting the Act's grant of jurisdiction to suits in equity for an injunction is consistent with Congressional intent to vest enforcement power in the SEC. But the restriction refutes respondent's argument that Congress intended to give disgruntled investors the right to sue for money damages.[5]

[3]*See,* Brief for Respondent at pages 12-19.

[4]The complete text of Section 214 of the Advisers Act is set forth in *Addendum B* to the Brief for Petitioners.

[5]The SEC appears ready to meet its enforcement responsibilities. In a recent address to the Investment Counsel Association, SEC Commissioner, Roberta S. Karmel, stated that "the Commission has established a new Office of Investment Adviser Regulation in the Division of Investment Management" whose sole function "will be to oversee investment advisors." Karmel, R.S., The Goal of Professionalism in Investment Adviser Regulation 7 (May 3, 1979) (Address to the Investment Counsel Association of America, Inc., available from the Securities and Exchange Commission, Washington, D.C.). Commissioner Karmel added that if a private right of action is not implied in this case it "could mean a more pronounced SEC presence in the day-to-day affairs" of investment advisers, and "could result in a more vigorous examination program." *Id.* at 8.

In *Touche Ross,* this Court called attention to "the statutory scheme of which § 17(a) is a part." *Id.* at 2487. The Court noted that Section 17(a) "is flanked by provisions of the 1934 Act that explicitly grant private causes of action" and that "when Congress wished to provide a private damage remedy, it knew how to do so and did so expressly." *Id.* (citations omitted).

Here, Section 206 of the Advisers Act is part of a statutory scheme that includes the Investment Company Act. The Advisers Act and the Investment Company Act are companion statutes. S. Rep. No. 91-184, 91st Cong., 1st Sess. 43 (1969). In 1970, the Investment Company Act was amended to create a private right of action against certain investment advisers.[6] No such right was added to the Advisers Act. *See generally,* Reply Brief for Petitioners at pages 9-10.

In *Touche Ross,* this Court said that "generalized references to the 'remedial purposes' of the 1934 Act will not justify reading a provision 'more broadly than its language and the statutory scheme reasonably permit.'" *Touche Ross & Co. v. Redington, supra,* 99 S.Ct. at 2490. The "mere fact" that Section 17(a) of the 1934 Act "was designed to provide protection for brokers' customers does not require the implication of a private damage action in their behalf." *Id.* (citations omitted). Here, the fact that *one* purpose of the Advisers Act may be to protect clients of investment advisers should not mean the Act affords ready access to the federal courts.

In *Touche Ross,* the Court observed that the statute involved, Section 17(a) of the 1934 Act, "neither confers rights on private parties nor proscribes any conduct as

[6]*See,* Public Law No. 91-547, § 20, 84 Stat. 1413, *adding* § 35(b) of the Investment Company Act, 15 U.S.C. § 80a-35(b) (1971).

unlawful." *Id.* at 2486. Here, Section 206 of the Advisers Act proscribes certain conduct by investment advisers as unlawful.[7] It may be argued that those prohibitions are significant. But the fact that a statute proscribed conduct as unlawful was not sufficient to give the plaintiffs standing in *Piper v. Chris-Craft Industries, Inc.*, 430 U.S. 1 (1977), nor to imply a private right of action in *National Railroad Passenger Corp. v. National Association of Railroad Passengers ("Amtrak")*, 414 U.S. 453 (1974).[8] *Piper* and *Amtrak* make it clear that prohibited conduct alone does not mean Congress intended to allow suits by private litigants.

That a statute proscribes conduct as unlawful may be *one* indication of legislative intent to allow private actions. But in this case there are abundant indications Congress did *not* intend to allow private actions—including the initial history of the Act; Congress's failure in 1960, 1970, 1976 and 1977 to confer jurisdiction over "actions at law"; and the Act's limited grant of jurisdiction to actions in equity "to enjoin violations". In determining Congressional intent, the language and history of the Advisers Act outweigh the mute prohibitions of Section 206.

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[7]Section 206 of the Investment Advisers Act of 1940, 15 U.S.C. § 80b-6 (1971), is set forth in *Addendum A* to Brief for Petitioners.

[8]In *Piper*, the plaintiff sought standing to sue under Section 14(e) of the Securities Exchange Act of 1934. Section 14(e) provides in part that it "shall be unlawful for any person to make any untrue statement of a material fact or to omit to state any material fact . . . in connection with any tender offer or request an invitation for tenders, or any solicitation of security holders in opposition to or in favor of any such offer, request, or invitation." *See, Piper v. Chris-Craft Industries, Inc.*, 430 U.S. 1, 24-25 (1977). In *Amtrak*, the plaintiffs sought to imply a private right of action under Section 404(a) of the Rail Passenger Service Act of 1970. Section 404(a) prohibits Amtrak from discontinuing passenger train service unless certain conditions have been satisfied. *See, National Railroad Passenger Corporation v. National Association of Railroad Passengers ("Amtrak")*, 414 U.S. 453, 455 n.3 (1974).

Cannon v. University of Chicago

In permitting a graduate school applicant to maintain a sex discrimination action under Title IX of the Education Amendments of 1972, this Court found abundant evidence of Congressional intent to allow private actions. *See, Cannon v. University of Chicago,* ..... U.S. ....., 99 S.Ct. 1946 (1979).[9]

In *Cannon,* Congress had authorized an award of attorney fees to the prevailing party, other than the United States, in actions against public education institutions. "The language of this provision explicitly presumes the availability of private suits to enforce" the Act. *Id.* at 1958-1959. The Advisers Act has no provision even remotely similar.

In *Cannon,* the statute in question was essentially identical to a statute banning race discrimination, and was enacted with the knowledge that the latter "had already been construed as creating a private remedy." *Id.* at 1957. Here, Section 206 was enacted six years *before* a federal court first implied a private right of action under the federal securities laws. *See, Kardon v. National Gypsum Co.*, 69 F.Supp. 512 (E.D. Pa. 1946). More importantly, Congress has not acted on the SEC's repeated requests since 1940 that it "facilitate" implication of a private remedy by extending the Act's grant of jurisdiction to actions at law. *See,* Brief for Petitioners at pages 18-21.

In *Cannon,* the Court expressed reluctance "to imply causes of actions under statutes that create duties on the part of persons for the benefit of the public at large." *Cannon v. University of Chicago, supra,* 99 S.Ct. at 1955 n.13. In this case, Section 206 imposes duties on investment

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[9]See *also, Davis vs. Passman,* .... U.S. .... 99 S.Ct. 2264 (1979).

advisers for the benefit of "any client *or prospective client*" (emphasis added). That is hardly a discrete class. Since it even includes those who may be "considering" the services of an investment adviser, Section 206 extends its benefits to a sizeable part of the public at large—in addition to creating a vague, ill-defined class of prospective plaintiffs. *See,* Reply Brief for Petitioners at pages 4-5.

In *Cannon,* this Court was confronted with legislative history which "rather plainly indicates that Congress intended to create" a private right of action. *Id.* at 1956. The opposite is true here.

2. No Distinction Should Be Made Between an Implied Right to Legal Relief and an Implied Right to Equitable Relief.

Section 214 of the Advisers Act limits its grant of jurisdiction to "suits in equity to enjoin" violations of the Act. As a result, it may be suggested that this Court could imply a private right to equitable relief, but not to legal relief.[10]

We agree with respondent that a distinction between legal and equitable relief would be "an historical anomaly." Brief for Respondent at page 42. In fact, no such distinction is appropriate.

In those cases where this Court has implied a private right of action, it has not distinguished between legal and

[10]*See, e.g.,* Tr. of oral argument, *Transamerica Mortgage Advisors, Inc. (TAMA), et al. v. Harry Lewis,* Dkt. No. 77-1645, March 20, 1979, at pages 7-8, 10, 16.

equitable relief.[11] Were this Court to imply a private right to equitable relief alone, the limitation would soon become meaningless. When the equity jurisdiction of a federal court is invoked, "the court has the power to decide all relevant matters in dispute and to award complete relief even though the decree includes that which might be conferred by a court of law." *Porter v. Warner-Holding Co.,* 327 U.S. 395, 399 (1946). Where, as here, the plaintiff seeks rescission, an award of money damages is routine—and would destroy any distinction this Court might make between a legal and equitable right of action. *See, e.g., Chasins v. Smith Barney & Co., Inc.,* 438 F.2d 1167 (2d Cir. 1970); *Janigan v. Taylor,* 344 F.2d 781 (1st Cir. 1965). *See also, Gulbenkian v. Gulbenkian,* 147 F.2d 173 (2d Cir. 1945) where the court awarded money damages in lieu of specific performance.

[11]*See e.g., Johnson v. Railway Express Agency, Inc.,* 421 U.S. 454 (1975), holding that a successful plaintiff under the Civil Rights Act of 1866 could obtain legal and equitable relief, as well as punitive damages under certain conditions.

CONCLUSION

For the reasons set forth in this brief and in their two earlier briefs, petitioners respectfully pray an order of this Court *reversing* the decision of the court below.

Respectfully submitted,

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